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No. 01-1858

In the Supreme Court of the United States

JAMES IHNEN AND LISA IHNEN, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether, under the circumstances of this case, petitioners may recover tax payments that they made under an agreement that compromised the amount claimed due and barred claims for refund of the amounts paid.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-7a) is reported at 272 F.3d 577. The opinion of the district court (Pet. App. 8a-16a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 27, 2001. A petition for rehearing was denied on March 19, 2002 (Pet. App. 17a). The petition for a writ of certiorari was filed on June 17, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Commissioner of Internal Revenue determined that petitioners failed to report income that they received from a restaurant that they owned during the years 1986 through 1991. Following completion of the tax audit, the Commissioner proposed deficiency assessments totaling $200,995 in taxes and $177,207 in fraud and other penalties. Under a settlement reached by the parties in 1995, the Commissioner conceded the fraud penalties and $52,707 in taxes and petitioners agreed to pay the remaining taxes and penalties. To memorialize their agreement, the parties executed a Form 870-AD, Offer To Waive Restrictions On Assessment And Collection Of Tax Deficiency And To Accept Overassessment. The Form 870-AD provided that "[n]o claim for refund or credit will be filed or prosecuted by the taxpayer[s] for the years stated on this form" and that the Commissioner would not reopen the case in the absence of fraud, malfeasance, misrepresentation, concealment, or important mathematical error. Pet. App. 9a-11a.

Petitioners abided by their agreement until September 1998, when they filed claims for refund of the payments they had made under the Form 870-AD. Petitioners asserted at that time that the accounting method used by the IRS in arriving at the assessments proposed for the years covered by the settlement agreement was erroneous. By the time that petitioners made these objections to those determinations, however, the statute of limitations had run against the Commissioner, barring him from assessing and collecting the taxes that he had conceded under the agreement. When the Commissioner denied the claims for

refund, petitioners filed this refund suit in the district court. Pet. App. 10a-12a.

2. The United States moved for summary judgment, arguing that petitioners were barred by the settlement agreement from seeking refunds for the years 1986 through 1991. In *Cain* v. *United States*, 255 F.2d 193 (1958), the Eighth Circuit had held that, even though an informal settlement agreement is not final and conclusive until it is approved by the Secretary of the Treasury or his delegate, such an agreement becomes binding on the parties once the statute of limitations bars the Commissioner from recovering the taxes that he conceded under the agreement. The district court followed *Cain* and granted the government's motion for summary judgment in this case. Pet. App. 8a-16a. The court noted that petitioners' attempt to litigate the merits of the proposed assessments after the government was barred from assessing the full amount of taxes originally asserted was "precisely the injustice sought to be avoided by the theory of estoppel." *Id.* at 14a.

3. The court of appeals affirmed. Pet. App. 1a-7a. The court reaffirmed "*Cain*'s clearly enunciated rule" that "it is sufficient to preclude a taxpayer from claiming refund, in relation to an executed settlement agreement, that the statute of limitations has run against the right of the Commissioner to deal with the situation further." *Id.* at 5a (quoting 255 F.2d at 199).

The court of appeals noted that, at oral argument, "in a final effort to avoid the holding of Cain," petitioners sought to waive the statute of limitations as a defense to any counterclaim the government might have made for additional taxes. Pet. App. 5a. The court held that this attempted waiver came "too late" because, "absent exceptional circumstances, this court will not consider

issues first raised on appeal." *Id.* at 6a. The court accordingly declined to rule "on whether a waiver, timely made, would serve to defeat the government's estoppel argument." *Ibid.*

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

1. a. Under Sections 7121 and 7122 of the Internal Revenue Code, a formal administrative settlement of a person's tax liability must be "approved by the Secretary" of the Treasury or his delegate to be "final and conclusive." 26 U.S.C. 7121(b). See 26 U.S.C. 7122(a). To avoid the delays and costs attendant to that formal settlement process, the Commissioner routinely enters into informal settlement agreements—under the Form 870-AD involved in this case—to resolve the bulk of tax cases each year.

At the very outset of the administration of the income tax, the Commissioner took the position that such informal agreements were binding in the same manner as formal settlement agreements. This Court, however, long ago ruled against the Commissioner on that question. In *Botany Worsted Mills* v. *United States*, 278 U.S. 282 (1929), the Court held that a settlement agreement is not binding, of its own terms, unless it has been approved by the Secretary under the provisions of what is now 26 U.S.C. 7122. In so ruling, however, the Court expressly left open the question whether an informal settlement agreement of the type made in the present case might, "under some circumstances, [be] binding on the parties by estoppel." 278 U.S. at 289.

b. During the last 73 years, several courts of appeals have addressed the question left open in *Botany Mills*. These courts have uniformly concluded that a taxpayer *is* barred by estoppel from disavowing such an informal settlement agreement when, as in the present case, the taxpayer files a claim for refund *after* the statute of limitations has run to bar the assessment and collection of the taxes that the Commissioner conceded in the informal settlement agreement. *Stair* v. *United States*, 516 F.2d 560, 564-565 (2d Cir. 1975); *Aronsohn* v. *Commissioner*, 988 F.2d 454, 456-457 (3d Cir. 1993); *Daugette* v. *Patterson*, 250 F.2d 753, 756-757 (5th Cir.), cert. denied, 356 U.S. 902 (1958); *Elbo Coals, Inc.* v. *United States*, 763 F.2d 818, 820-821 (6th Cir. 1985); *Cain* v. *United States*, 255 F.2d 193, 198 (8th Cir. 1958); *Guggenheim* v. *United States*, 77 F. Supp. 186, 196 (Ct. Cl. 1948), cert. denied, 335 U.S. 908 (1949). See also *General Split Corp.* v. *United States*, 500 F.2d 998, 1003-1004 (7th Cir. 1974). As the Court of Claims observed in *Guggenheim* v. *United States*, 77 F. Supp. at 196:

> [i]t would obviously be inequitable to allow the plaintiff to renounce the agreement when the Commissioner cannot be placed in the same position he was when the agreement was executed. A clear case for the application of the doctrine of equitable estoppel exists and should be applied.

In reaching that same conclusion in *Cain* v. *United States*, 255 F.2d at 198, the Eighth Circuit explained that enforcement of an informal settlement agreement by estoppel is not contrary to the statutory provisions for formal settlements (now set forth in Sections 7121 and 7122):

> [N]o conflict or violation of them can be claimed, in allowing the statute of limitations, on general legal ground, to put a seal of finality on a tax settlement * * * which the parties have seen fit to honor in practice by a performance of it; and of which neither has made any repudiation during the period of the running of the statute of limitations against the Government.

These courts have emphasized that, if a material misrepresentation or omission is an element of such an estoppel, that requirement is satisfied by the taxpayer's failure, at the time of the settlement, to state that he might not honor his promise not to file a refund suit. *Stair* v. *United States*, 516 F.2d at 565; *Elbo Coals, Inc.* v. *United States*, 763 F.2d at 821; *Union Pac. R.R.* v. *United States*, 847 F.2d 1567, 1572 (Fed. Cir. 1988) ("failure to state a position that equity required to be stated promptly if it was not to be deemed abandoned, stands in lieu of any affirmative misrepresentation"). As the court emphasized in *LeFever* v. *Commissioner*, 100 F.3d 778, 787 (10th Cir. 1996), dispensing with proof of more specific misrepresentations to obtain favorable tax treatment in individual cases "fosters better tax administration and reduces unpredictability" that would otherwise result from decisions "attempting to assess relative blame between the taxpayer and the IRS."

c. In the present case, petitioners did not file their claims for refund until after the statute of limitations had run on the Commissioner's ability to assess and collect the taxes that were conceded under the agreement. Pet. App. 5a. The court of appeals thus correctly applied the established case law in holding, in these circumstances, that petitioners were estopped from

seeking a refund in violation of their Form 870-AD settlement agreement. *Id.* at 4a-5a.

2. Petitioners err in claiming (Pet. 8-13) that the decision in this case conflicts with the decision of this Court in *Botany Mills*. Although the government had contended before the Court of Claims in the *Botany Mills* case that the taxpayer was estopped from questioning the informal settlement agreement, that claim was abandoned in this Court because the record did not support it. 278 U.S. at 287-288. The record did not support an estoppel in *Botany Mills* because the applicable statute of limitations on assessment had not run when the taxpayer filed its refund claim in that case. The taxpayer in *Botany Mills* filed its refund claim on February 1, 1922, which was almost a year before the time for assessment expired in January 1923 (as petitioners agree (Pet. 10-11)). The government therefore did not contend in *Botany Mills* that an estoppel existed, and this Court therefore did not consider that issue. Instead, the Court explicitly reserved the question whether an informal settlement agreement of the type made in the present case might, "under some circumstances, [be] binding on the parties by estoppel." 278 U.S. at 289.

3. Petitioners also err in claiming (Pet. 13-15) that the decision in this case conflicts with decisions in other circuits. For example, in relying on *Joyce* v. *Gentsch*, 141 F.2d 891 (6th Cir. 1944), petitioners ignore the subsequent decision of that circuit in *Elbo Coals, Inc.* v. *United States*, 763 F.2d at 820, which noted that the version of the Form 870-AD at issue in *Joyce* "was very different from the one at issue here," because the former version provided that execution of the form would not preclude the Commissioner from asserting a further deficiency. Under the prior version of the

informal settlement agreement that had been involved in *Joyce*, the government "could not have been relying upon an agreement when it failed to assess any deficiencies during the remaining period of the statute of limitations," and there was no detriment to the government as a result of the agreement, "since it was expressly free, if it had found reason, to further assess deficiencies against the taxpayers." *Ibid.* The Sixth Circuit made clear in *Elbo Coals* that when, as here, the Form 870-AD expressly provides that the government will not reopen the case, a "statement by the taxpayer that no refund claim would be filed is misrepresentation of a kind sufficient to ground estoppel once the taxpayer has reneged." *Id.* at 821 (citing *Stair* v. *United States*, 516 F.2d at 565).

Petitioner similarly errs in claiming (Pet. 14-15) that the decision in this case conflicts with *Uinta Livestock Corp.* v. *United States*, 355 F.2d 761 (10th Cir. 1966). In the subsequent decision of the Tenth Circuit in *LeFever* v. *Commissioner*, 100 F.3d at 787, the Tenth Circuit acknowledged that its *Uinta* decision was inconsistent with the earlier decision of that court in *Continental Oil Co.* v. *Jones*, 177 F.2d 508 (1949), cert. denied, 339 U.S. 931 (1950). The court concluded that *Continental Oil* is to be given "precedence over the *Uinta* decision" and expressly rejected the suggestion in *Uinta* that an estoppel must be based on "a showing that the taxpayer made an intentional misrepresentation or a wrongful misleading silence in obtaining favorable tax treatment." *LeFever* v. *Commissioner*, 100 F.3d at 786.

Similarly, in claiming (Pet. 7, 14-15) that cases in the Second Circuit (*Lignos* v. *United States*, 439 F.2d 1365 (1971)), Third Circuit (*Bank of New York* v. *United States*, 170 F.2d 20 (1948)), and Seventh Circuit (*Bennett* v. *United States*, 231 F.2d 465 (1956)) conflict

with the decision below, petitioners ignore later decisions in those same circuits which make clear that no such conflict exits. For example, in *Stair* v. *United States*, 516 F.2d at 564, the Second Circuit held that a taxpayer is estopped to claim a refund when it had executed a Form 870-AD. The court in *Stair* distinguished *Lignos* on the ground that there was no proof in that case that the government had made any concession to the taxpayer as part of the agreement. *Ibid.* Similarly, in *Aronsohn* v. *Commissioner*, 988 F.2d at 456-457, the Third Circuit held that a Form 870-AD settlement was enforceable by estoppel without discussing its earlier decision in *Bank of New York* —perhaps because a note attached to the agreement in *Bank of New York* had expressly reserved the right to file a claim for refund for the tax involved in that case.[1] See 170 F.2d at 23.[2] And, in affirming a district court decision holding a taxpayer bound by estoppel to a Form 870-AD agreement, the Seventh Circuit in *General Split Corp.* v. *United States*, 500 F.2d at 1003, distinguished its prior decision in *Bennet* on the basis that the government had failed to show that the official

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[1] The court emphasized in *Aronsohn* that it agreed "with the general principle that an informal Form 870-AD settlement agreement which includes in its terms an explicit preclusion of refund or credit claims for the years covered under the settlement may equitably bind the taxpayer by estoppel from bringing a subsequent refund action." 988 F.2d at 456.

[2] Petitioners err in claiming that, under the settlement agreement involved in this case, they "contemporaneously reserved in writing the right to seek a refund." Pet. 9. The letter on which they rely for this claim was sent by their attorney to the IRS before the date the Form 870-AD was executed, and it states only that the settlement he was proposing in "no way prevents or precludes my clients for making an offer in compromise." Pet. 5-6.

who had executed the Form 870-AD on behalf of the Commissioner in that case was authorized to do so. See also *id.* at 1003 n.9.

Finally, petitioners err in claiming (Pet. 15) that the decision in this case conflicts with *Whitney* v. *United States*, 826 F.2d 896 (9th Cir. 1987). The decision in that case rested on whether the Form 870-AD executed by Whitney was part of a package settlement that included the Commissioner's concessions—not to Whitney to whom the government had conceded nothing—but to Whitney's partner. Whitney and his partner had each claimed a deduction for the same partnership expense on their individual returns. In his Form 870-AD, Whitney conceded the deduction and paid the corresponding deficiency. 826 F.2d at 898. Under a separate Form 870-AD, the Commissioner allowed the deduction to Whitney's partner. Asserting that the two forms reflected a package settlement, the government contended that its reliance on Whitney's Form 870-AD in permitting the time to assess a deficiency against his partner to expire should estop Whitney from claiming a refund. The Ninth Circuit remanded the case because it was unable to determine on the record before it whether the parties intended to enter into a package deal and remanded the case to the district court for factual findings on that issue. *Ibid.* The court indicated, in doing so, that the doctrine of estoppel would apply if such a package settlement had been made. *Ibid.* There is no conflict between the *Whitney* decision and the decision in the present case, for the record clearly reflects that the government "waived fraud penalties and conceded a reduction of $52,707 in taxes" in entering into the Form 870-AD agreement in this case. Pet. App. 3a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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